BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID LOYD RAINES	)	
Claimant	)	
	)	
VS.	)	
	)	
GRIFFIN WHEEL COMPANY	)	
Respondent	)	Docket No. 247,094
	)	
AND	)	
	)	
LIBERTY MUTUAL FIRE INS. CO.	)	
Insurance Carrier	)	

ORDER

Both claimant and respondent appealed Administrative Law Judge Robert H. Foerschler's Award dated May 8, 2002. The Board heard oral argument on November 20, 2002.

APPEARANCES

Elaine M. Eppright of Kansas City, Missouri, appeared for the claimant. Randall W. Schroer of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined the claimant suffers from a 25 percent permanent partial general body disability as a result of workplace exposure to hexamethylenetetramine (HMT) and formaldehyde which caused a severe recurrence of his asthma. The ALJ did not award claimant a work disability after finding there was no physician testimony as to what tasks the claimant could no longer perform.

The claimant requests review and argues he is entitled to a work disability. Claimant argues that even though he did not establish a task loss he has nonetheless suffered a wage loss. Claimant argues his percentage of wage loss plus a 0 percent task loss results

in a higher percentage of disability than the 25 percent functional impairment rating. Consequently, claimant argues the ALJ erred in not awarding a work disability.

The respondent argues the claimant has failed to prove his asthma was caused by a work-related exposure to HMT or formaldehyde. Consequently, respondent requests that the ALJ be reversed and an award of compensation denied.

In the alternative, respondent argues claimant failed to establish he suffered a functional impairment because the doctors did not utilize the AMA *Guides*[1] in determining claimant's functional impairment. Respondent further argues claimant is not entitled to a work disability. Respondent notes there was no physician testimony regarding task loss and claimant has not met his burden of proof regarding that component of the work disability formula. And because claimant did not engage in a good faith effort to find employment, respondent argues a comparable wage should be imputed. Therefore, respondent requests the ALJ's denial of a work disability be affirmed. Lastly, respondent argues claimant has not met his burden of proof to establish he is entitled to an award of future medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be modified to award claimant a 50 percent work disability based upon a 0 percent task loss and a 100 percent wage loss.

Claimant began employment with respondent in November 1998 as a spray paint booth operator. Respondent is a foundry that produces steel railway wheels. Claimant's job required him to spray paint the molds so the steel would not adhere to the mold. In the course of his employment he also worked near a sandblasting machine used to clean the molds and in close proximity to the core baker where sand was added to the mold and heated. The chemical HMT is mixed with the sand before it is added to the mold.

Claimant was required to operate a manual spray paint booth as well as ensure that an automatic spray paint booth was properly functioning. As a result, claimant went back and forth between the two booths 40 or 50 times a work shift. The path he took caused him to come within a few feet of the core baker. The core baker reached temperatures from 495 to 550 degrees.

At the end of January 1999, claimant was working on 28-inch wheels. Because there were problems with defects more heat and paint was applied to try to get the wheels to come out right. It was that week claimant began having problems coughing at work and

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.)

he started coughing up a white substance at home. The following week claimant coughed so hard he sprained his ribs. Claimant's family doctor recommended he use a respirator. When claimant gave the doctor's note to his foreman he was provided a paper mask to wear while working. As claimant continued trying to work he would have coughing attacks.

Respondent referred claimant to Dr. Joseph E. Henry for treatment. Claimant noted that on two separate occasions when he attempted to return to work he became symptomatic within a few hours. When claimant attempted to return to work on December 2, 1999, he became symptomatic in two hours and had to leave work. Later that day he went to the emergency room with an asthma attack.

Dr. Henry noted claimant had asthma and hay fever as a child but that he had been asymptomatic for those conditions for 21 years before he began working for respondent. Dr. Henry ultimately concluded that there was something at claimant's workplace that aggravated and worsened claimant's asthma. As a result the doctor opined claimant developed a sensitivity or hypersensitivity to a product claimant was exposed to in his workplace. Dr. Henry advised claimant not to return to the environment where he had been working and that he needed to work in a clean environment, free of air pollutants. Dr. Henry concluded claimant suffered a 25 percent permanent partial impairment but admitted he never consulted the AMA *Guides* in order to arrive at that percentage.

Claimant was examined by Dr. Gerald R. Kerby on June 8, 2000, and August 11, 2000, at his attorney's request. Dr. Kerby diagnosed claimant with occupational asthma. The doctor noted the onset of the asthma symptoms after claimant had worked a few months and after claimant left the workplace his condition would somewhat improve but that when he attempted to return to work he had an immediate recurrence of symptoms. Because the chemical HMT degrades and produces formaldehyde when subjected to high temperatures, and because formaldehyde is well known to be a respiratory sensitizer and cause of occupational asthma, the doctor concluded claimant suffers from occupational asthma due to exposure to HMT and its thermal degradation product formaldehyde.

Dr. Kerby opined claimant suffered a 25 percent permanent partial impairment of function based upon the *Guidelines for the Evaluation in Impairments* published by the American Thoracic Society. But the doctor later noted that using the AMA *Guides* he would still rate claimant's impairment at 25 percent. Dr. Kerby noted that he relied on Table 10 which provided that the impairment estimate for asthma should be left to the judgment of a physician with expertise in lung disease.

After receiving Dr. Kerby's report that exposure to HMT and formaldehyde caused claimant's asthma, the respondent contracted with Mary J. Erio, an industrial hygienist, to perform an exposure sampling for HMT and formaldehyde in the area where claimant had worked. Ms. Erio reported that neither HMT or formaldehyde were present in the workplace in detectable quantities.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5] It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[6]

The medical records indicate claimant had asthma when he was young but that condition became asymptomatic while he was a teenager. The claimant did not have any problems for the next 21 years. Claimant's pre-employment physical with respondent did not indicate claimant suffered any pulmonary dysfunction. Claimant then became symptomatic after a work week where additional heat and paint was being used to attempt to correct some defects in the production of the wheels. When claimant was away from the work environment his symptoms would somewhat improve. Upon his attempt to return to work he again became symptomatic.

Both Drs. Henry and Kerby concluded claimant's exposure to something at work caused his airway disease to be aggravated and worsened. Dr. Henry could not identify the specific chemical but noted claimant symptomatically improved when away from work and worsened when placed back in his work environment. Dr. Kerby specifically related claimant's condition to exposure to HMT and its by product formaldehyde. Dr. Kerby noted that Ms. Erio's sample was simply a snapshot of conditions on the day the sampling was performed and that it confirmed the HMT was present in the sand. Dr. Kerby further explained that claimant had become sensitized to formaldehyde and once sensitized his symptoms could be caused by very small amounts of the substance which might be below the level of detection of permissible exposure limits.

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[2]K.S.A. 44-501(a); *see also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[3]K.S.A. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4]*Brobst v. Brighton Place North*, 24 Kan. App.2d 766, 955 P.2d 1315 (1997).

[5]*Springston v. IML Freight, Inc.*, 10 Kan. App.2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[6]*Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984).

The Board concludes claimant has met his burden of proof to establish his asthma was aggravated and worsened by his work-related formaldehyde exposure during the week more heat and paint was utilized to correct some defects with the 28-inch wheels.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[7] The respondent argues that neither doctor followed the statutory requirement of using the fourth edition of the AMA *Guides* for determining claimant's functional impairment.

Dr. Henry merely adopted the functional percentage rating given by Dr. Kerby and agreed that he did not consult the Guides. In his initial determination of claimant's functional impairment, Dr. Kerby utilized the American Thoracic Society Guidelines to determine the claimant's percentage of functional impairment. But Dr. Kerby then consulted the fourth edition of the AMA *Guides* and noted that for an asthma condition the Guides noted a person should be evaluated by physicians with expertise in lung disease, and the impairment estimate should be left to the physician's judgment. Dr. Kerby qualifies as a expert in lung disease and accordingly his opinion regarding the percentage of functional impairment complies with the Guides. The Board adopts and affirms the ALJ's determination claimant suffers a 25 percent permanent partial functional disability.

The Board must next determine whether claimant is entitled to a work disability. Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall**

[7] K.S.A. 44-510e(a).

> **not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[10]

Respondent argues claimant did not make a good faith effort to find employment. The Board disagrees. Claimant provided a list of over 50 employers that he had contacted seeking work. And Mary Titterington, a vocational rehabilitation counselor and consultant, testified that claimant was seeking appropriate employment in clean work environments. She opined claimant had made a good faith effort to obtain work. The Board finds claimant has made a good faith effort to obtain employment. Because he has been unsuccessful and is currently unemployed he is entitled to a 100 percent wage loss.

Turning to the task loss component of the work disability formula, the statute requires that a 15-year history of job tasks be considered by the physicians. As no such job task analysis was considered by any of the physicians claimant has failed in his burden of proving what, if any, task loss he has suffered. The Board, therefore, will utilize a zero percent task loss when computing claimant's work disability.

Consequently, claimant has established he has suffered a 100 percent wage loss and a 0 percent task loss, which results in a 50 percent work disability.

The respondent argued claimant was not entitled to an award of future medical because claimant failed to establish permanent impairment. Because the Board finds

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[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[10] *Id.* at 320.

claimant did suffer permanent impairment this argument fails. Claimant is entitled to future medical upon proper application to the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated May 8, 2002, is modified to reflect claimant has suffered a 50 percent work disability.

The claimant is entitled to 34.43 weeks temporary total disability compensation at the rate of $366 per week or $12,601.38 followed by 197.79 weeks of permanent partial disability compensation at the rate of $366 per week or $72,391.14 for a 50 percent work disability, making a total award of $84,992.52.

As of May 9, 2003, there would be due and owing to the claimant 34.43 weeks of temporary total disability compensation at the rate of $366 per week in the sum of $12,601.38 plus 189.28 weeks of permanent partial disability compensation at $366 per week in the sum of $69,276.48, for a total due and owing of $81,877.86, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $3,114.66 shall be paid at $366 per week for 8.51 weeks or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of May 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Elaine M. Eppright, Attorney for Claimant
Randall W. Schroer, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Director, Division of Workers Compensation